NO. _____

IN THE UNITED STATES SUPREME COURT

_____ TERM

CHARLES BORDEN, Jr.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Does the "use of force" clause in the Armed Career Criminal Act (the "ACCA"), 18 U.S.C. § 924(e)(2)(B)(i) encompass crimes with a *mens rea* of mere recklessness?

2. Did the district court violate Mr. Borden's due process rights when it applied to his sentencing a newer, more punitive interpretation of law than that which was in force at the time of his federal offense, such that his guidelines were enhanced from 77 to 96 months to a mandatory minimum sentence of 15 years to life in prison?

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1. Opinion, United States Court of Appeals for the Sixth Circuit, *United States of America v. Charles Borden, Jr.*, Court of Appeals No. 18-5409, affirming the district court, April 25, 2019.

2. Judgment, United States District Court for the Eastern District of Tennessee at Chattanooga, *United States of America v. Charles Borden, Jr.*, District Court No. 1:17-cr-120-HSM-CHS, sentencing Mr. Borden under the ACCA, April 17, 2018.

JURISDICTIONAL STATEMENT

Mr. Borden was sentenced under the Armed Career Criminal Act (the "ACCA"), 18 U.S.C. § 924(e)(2)(B)(i) on April 16, 2018, with the Judgement issuing April 17, 2018. He appealed, challenging the application of the ACCA and its 15-year mandatory minimum sentence on April 19, 2018. The United States Court of Appeals for the Sixth Circuit entered its Opinion affirming the judgment on April 25, 2019. This Court's jurisdiction is invoked under Title 28, United States Code, Section 1254(1). Rule 13(1) of the Supreme Court allows for ninety days within which to file a Petition for a Writ of Certiorari after entry of the judgment of the Court of Appeals. Accordingly, this Petition is timely filed.

Pursuant to Rule 29.4(a), appropriate service is made to the Solicitor General of the United States and to Assistant United States Attorney Luke A. McLaurin, who appeared in the United States Court of Appeals for the Sixth Circuit on behalf of the United States Attorneys Office, a federal office which is authorized by law to appear before this Court on its own behalf.

Petitioner Borden respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit. In that Opinion, the Sixth Circuit affirmed the district court's

determination that the ACCA applied to Mr. Borden because his prior Tennessee conviction for reckless aggravated assault constituted a violent felony under the use of force clause. In so doing, the Sixth Circuit also affirmed the district court's determination that Mr. Borden's due process rights were not violated by counting his prior reckless aggravated assault conviction under the ACCA, even though Sixth Circuit law at the time of his offense clearly held the opposite - that reckless aggravated assault did not qualify under the ACCA's use of force clause.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Due Process Clause, Fifth Amendment, United States Constitution:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .

18 U.S.C. § 921(a)(33)(A):

Except as provided in subparagraph (C), the term "misdemeanor crime of domestic violence" means an offense that—

> **(i)** is a misdemeanor under Federal, State, or Tribal law; and
>
> **(ii)** has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.

18 U.S.C. § 922(g):

It shall be unlawful for any person—

> **(9)** who has been convicted in any court of a misdemeanor crime of domestic violence,

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 924(e)(1):

In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

18 U.S.C. § 924(e)(2)(B):

As used in this subsection--

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

> **(i)** has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> **(ii)** is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another . . .

Tenn. Code Ann. § 39-13-101(a) (2005):

A person commits aggravated assault who:

(2) Recklessly commits an assault as defined in § 39-13-101(a)(1), and:

(A) Causes serious bodily injury to another; or
(B) Uses or displays a deadly weapon.

STATEMENT OF THE CASE AND FACTS

The Circuits are split with respect to whether the use of force clause in the ACCA encompasses crimes committed recklessly. The Sixth Circuit falls into the group that extends this Court's holding in *Voisine v. United States*, 136 S. Ct. 2272 (2016) (addressing the phrase "misdemeanor crime of domestic violence" in 18 U.S.C. § 921(a)(33)(A)) to the use of force clause in the ACCA. *United States v. Verwiebe*, 874 F.3d 258, 262 (6th Cir. 2017). Even within the Sixth Circuit, however, there is disagreement on this point, as a separate panel argued that the ACCA's use of force clause cannot be so broad as to include recklessness. *United States v. Harper*, 875 F.3d 329 (6th Cir. 2017) (explaining it was bound by *Verwiebe*, despite its disagreement).

Prior to *Verwiebe*, and since at least as early as 2010, the law in the Sixth Circuit was that crimes committed recklessly did not qualify under the use of force clause. *United States v. McFalls*, 592 F.3d 707, 716 (6th Cir. 2010)[1]. Further, "the circuit courts overwhelmingly held before *Voisine* that crimes involving the reckless use of force are not crimes of violence under § 4B1.2 [or

[1] See *United States v. Vanhook*, 640 F.3d 706, 712 n.4 (6th Cir. 2011) (explaining that interpretations of the use of force clause in the ACCA and the career offender definition of the United States Sentencing Guidelines ("USSG") § 4B1.2(a)(1) are used interchangeably); and *Davis v. United States*, 900 F.3d 733, 736 (6th Cir. 2018) (same).

violent felonies under the ACCA]." *Harper*, 875 F.3d at 332 (collecting cases).

When Mr. Borden committed his instant offense, being a felon in possession of a firearm, this Court had already decided *Voisine*, but the Sixth Circuit had not yet extended *Voisine* to either the career offender guideline enhancement or the ACCA. *Voisine* was decided June of 2016. 136 S. Ct. 2272. Mr. Borden's offense occurred April 11, 2017. (Indictment, R. 1, Page ID# 1).

But, prior to committing his offense, on January 24, 2017, the District Court for the Eastern District of Tennessee held that it was not convinced that the Sixth Circuit would interpret *Voisine* as invalidating *McFalls*. *United States v. Wehunt*, 230 F. Supp. 3d 838, 846 (E.D. Tenn. Jan. 24, 2017). The Sixth Circuit did not overturn *McFalls* until October 20, 2017, and even then noted that it was taking sides in an active circuit split on the issue. *Verwiebe*, 874 F.3d at 262-64. Thereafter, on January 5, 2018, Mr. Borden pled guilty to being a felon in possession of a firearm, retaining his right to appeal if the district court applied the ACCA. (Plea Agreement, R. 14); (Minutes, R. 19); (Amended Plea Agreement, R. 22, Page ID# 45, 46).

The United States Probation Office prepared a Presentence Report. (Presentence Report ("PSR") (sealed document), R. 30, Page ID# 140). It averred Mr. Borden qualified for the enhanced sentencing provisions of the ACCA based on four sets of criminal convictions: three for Tennessee aggravated assault (¶¶45, 47, 52) and one for Tennessee promotion of methamphetamine manufacture (¶57). (PSR, R. 30, Page ID# 146, 152-156, 159, 161, 162). This established a guideline range of 180 to 210 months. (*Id*. at Page ID# 175, ¶ 112). Without the ACCA his guidelines would have been 77 to 96 months. (*Id*. at Page ID# 145-46, 164, ¶¶ 20, 27, 28, 61). The ACCA more than doubled his guideline range.

Mr. Borden objected to the Presentence Report's conclusion, arguing the reckless aggravated assault conviction described in paragraph 52 and the promoting methamphetamine manufacture conviction were not ACCA predicate offenses. (Objections (sealed document), R. 29, Page ID# 133).[2] At the time of Mr. Borden's Objections, *Verwiebe* and *Harper*, were in various stages of litigation. (Objection, R. 29, Page ID# 133-137).

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[2] At his sentencing hearing, the government agreed with Mr. Borden that his promotion of methamphetamine manufacture conviction should not be an ACCA predicate, and the district court sustained the objection. (TR Sentencing, R. 48, Page ID# 292-93). Accordingly, it is not addressed further here.

At his sentencing Mr. Borden acknowledged that under *Verwiebe*, the district court was bound to hold that crimes committed recklessly qualify under the ACCA's use of force clause. (TR Sentencing, R. 48, at Page ID# 279-280); (Objections, R. 29, Page ID# 137). He also explained his disagreement with that conclusion, and that he was preserving his argument that *Verwiebe* was wrongly decided. (TR Sentencing, R. 48, at 281); (Objections, R. 29, Page ID# 137). He also argued that sentencing him under the ACCA would violate the *Ex Post Facto* principles incorporated into the due process clause. (TR Sentencing, R. 48, at 282-84, 287); (Objections, R. 29, Page ID# 137). He argued that *McFalls* was the force-clause-interpretation in place at the time of his offense and indictment, and thus *McFalls*'s interpretation should be applied at his sentencing. (Objections, R. 29, Page ID# 137). He argued that the "unforeseeable and retroactive judicial expansion of narrow and precise" language deprived him of fair warning and other due process rights. (Objections, R. 29, Page ID# 137) (quoting *Bouie v. City of Columbia*, 378 U.S. 347, 352 (1964)).

The government did not respond in writing to Mr. Borden's Objections, but did argue at the sentencing hearing that *Voisine* was the decision that changed the law as stated in *McFalls*, and that *Verwiebe* was not an extension

of *Voisine*. (TR Sentencing, R. 48, Page ID# 290). The district court overruled Mr. Borden's objection to use of the reckless aggravated assault conviction as an ACCA predicate. (*Id*. at Page ID# 291). It found that application of *Verwiebe*'s interpretation did not violate Mr. Borden's due process rights because it "was just not convinced that due [process] . . . is what we're dealing with here." (TR Sentencing, R. 48, Page ID# 291).

Thus, the district court held that Mr. Borden qualified for application of the ACCA, and applied the fifteen-year mandatory minimum. (*Id*. at Page ID# 294). Starting at that guideline range, the district court then granted the government's motion for a downward departure (which was based on reasons detailed in sealed motions unrelated to the application of the ACCA). (*Id*. at Page ID# 295-96). The district court noted that it believed a three-level reduction in Mr. Borden's offense level was appropriate. (*Id*. at 296). Thus, the court looked to the guidelines sentencing chart where 180 months first appears for a defendant with a criminal history category of VI. (*Id*.). This is at an offense level of 29. (*Id*.). The district court then reduced the offense level by three points, ending at 26. (*Id*.). An offense level of 26 for a defendant in a criminal history category of VI yields a guideline range of 120 to 150 months. (*Id*.). However, after further consideration and discussion

with counsel, the district court determined that the appropriate reduction amounted to a sentence of 115 months. (*Id*. at 298-99).

Mr. Borden appealed the application of the ACCA. (Notice of Appeal, R. 44, Page ID# 223). On appeal he reasserted his argument that the *Ex Post Facto* principles incorporated into the due process clause prevented application of *Verwiebe*, and thus prevented counting his reckless aggravated assault under toward the ACCA. (Borden Brief, App. R. 27, Page ID# 14-16);[3] (Borden Reply, App. R. 32, Page ID# 4-5). He also argued that the district court "erred when it found Mr. Borden's reckless aggravated assault conviction to be a violent felony." (*Id*. at Page ID# 21). Thus, "[i]t should not have subjected Mr. Borden to the ACCA's enhanced penalties." (*Id*.). In reaching this conclusion, Mr. Borden argued that Tennessee's reckless aggravated assault statute is broad enough to include driving under the influence or otherwise reckless driving. (*Id*. at Page ID# 17-21).

The government argued on appeal that the Sixth Circuit's holding in *Verwiebe* was mandated by *Voisine*, which meant that applying it did not

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[3] For Mr. Borden's appellate record, undersigned uses "Page ID#" to reference the page numbers applied by the Sixth Circuit's ECF document filing system. These page numbers are located as part of the file-stamp at the top right of each page.

violate ex post facto and due process principles. (Gov't Brief, App. R. 29, Page ID# 15-19). It also argued that Tennessee's reckless aggravated assault statute categorically qualifies as a violent felony, regardless of whether it encompasses reckless driving. (*Id*. at Page ID# 19-27).

The Sixth Circuit Court of Appeals noted Mr. Borden's argument that due process prevented applying *Verwiebe* instead of *McFalls*, but concluded that because his sentence was within the non-ACCA guideline range he was not disadvantaged, and thus due process was not violated. (Opinion, App. R. 34-2, Page ID# 3). With respect to his argument that *Verwiebe* wrongly held that the ACCA use of force clause encompasses recklessness, the court noted other Judges agreed with his position, but that it was bound by *Verwiebe* and *Harper*. (*Id*. at Page ID# 3-4).

REASONS FOR GRANTING OF THE WRIT

This Court has not yet defined what *mens rea* is necessary to constitute a violent felony under the ACCA's use of force clause, 18 U.S.C. § 924(e)(2)(A)(i). In the absence of direction from this Court, a circuit split has developed, and continues to deepen, regarding whether crimes committed recklessly are sufficient to trigger the fifteen-year mandatory minimum of the ACCA.

The First, Fourth, and Ninth Circuits have held, after *Voisine*, and after the Sixth Circuit's decision in *Verwiebe*, that recklessness is not sufficient to satisfy the force clause in this context. *United States v. Rose*, 896 F.3d 104, 109-10 (1st Cir. 2018); *United States v. Hodge*, 902 F.3d 420, 427 (4th Cir. 2018); *United States v. Middleton*, 883 F.3d 485, 497-500 (4th Cir. 2018) (Floyd, J., concurring); *United States v. Orona*, 923 F.3d 1197, 1202-03 (9th Cir. May 10, 2019). The Third Circuit *sua sponte* granted en banc review in two cases to consider the question, *United States v. Harris*, 17-1861 (granted June 7, 2018) (ACCA), and *United States v. Santiago*, No. 16-4194 (granted June 8, 2018) (career offender), and those cases remain pending.

In contrast, along with the Sixth, the Fifth, Tenth, and D.C. Circuits have held, after *Voisine*, that recklessness is sufficient. *See United States v. Mendez-*

Henriquez, 847 F.3d 214, 220-22 (5th Cir. 2017); *United States v. Bettcher*, 911 F.3d 1040, 1046 (10th Cir. 2018) (rehearing denied Mar. 19, 2019); *United States v. Haight*, 892 F.3d 1271, 1281 (D.C. Cir. 2018). The Eighth Circuit has taken the middle ground. It held that recklessness is generally sufficient, *United States v. Fogg*, 836 F.3d 951, 956 (8th Cir. 2016), but after *Voisine* reaffirmed that it is not sufficient when the crime "'encompasses the unadorned offense of reckless driving resulting in injury.'" *United States v. Fields*, 863 F.3d 1012, 1015 (8th Cir. 2017) (relying on and quoting *United States v. Ossana*, 638 F.3d 895, 901 n.6 (8th Cir. 2011)). The specific statute at issue here, Tennessee's reckless aggravated assault,[4] also encompasses reckless driving resulting in injury. *See, e.g.*, *State v. Boone*, No. W2005-00158-CCA-R3CD, 2005 WL 3533318, *6 (Tenn. Crim. App. 2005) (defendant may be found guilty of reckless aggravated assault if he recklessly caused bodily injury using a deadly weapon, to wit: motor vehicle).

And, further evidencing the complexity of this question, Judges within the Sixth Circuit differ in their views. The panel that decided *Harper*, just a few

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[4] In 2005, Tennessee's reckless aggravated assault statute provided that: (a) A person commits aggravated assault who: . . . (2) Recklessly commits an assault as defined in § 39-13-101(a)(1), and: (A) Causes serious bodily injury to another; or (B) Uses or displays a deadly weapon. Tenn. Code Ann. § 39-13-102 (2005).

weeks after *Verwiebe*, explained why in its view *Verwiebe* was wrongly decided. 875 F.3d at 330-33. And Judge Stranch recently joined them. *Walker v. United States*, 769 F. App'x 195, 201 (6th Cir. Apr. 16, 2019) (Stranch, J., concurring) ("Like the *Harper* court, if we were not bound by *Verwiebe*, I would hold that an offense that requires only the reckless use of force, as does Texas robbery, is not a violent felony under the [force clause] of the ACCA.").

This split is leading to inconsistent application of the ACCA, and thus arbitrary application of the 15-year mandatory minimum. An individual with a prior conviction for reckless aggravated assault would get a minimum sentence of fifteen years – and up to life imprisonment – if he was unlucky enough to be indicted in the Sixth Circuit, yet, that same individual would have a statutory maximum of ten years if indicted in the Fourth. This arbitrary application of substantially different statutory ranges is not tolerable, and violates due process. This case presents this Court with a good vehicle to address this split, as it provides the Court with an opportunity to define what constitutes the *mens rea* required under the ACCA's use of force clause.

Further, Mr. Borden's second argument, that the ACCA was wrongly applied to him in violation of the ex post facto principle embodied in the due

process clause also raised important constitutional questions. Because the ACCA has such a drastic change to an individual's possible sentence, fair notice that it will apply to one's conduct is particularly important. This Court has not addressed the contours of the *Ex Post Facto* principles as applied to judicial interpretations of the ACCA, which is a statute that applies to different individuals largely on the basis of judicial interpretation. This Court is well aware of the difficulties the statute presents, as it has taken cases related to the scope of the ACCA nearly every year in recent memory. The shifting judicial interpretations have very real consequences for individuals, as one year their conduct could result in a maximum sentence of ten years, while the next the same conduct could result in fifteen years to life – depending not on newly written law, but on broadening judicial interpretations. The extent of the *Ex Post Facto* and due process principles as applied to the ACCA is therefore vitally important. This case give this Court the ability to define those limits.

Mr. Borden's case also provides this Court with the opportunity to address the *mens rea* necessary under the use of force clause to trigger the fifteen-year mandatory minimum, and possible life sentence, of the ACCA. And, in so doing, to settle the divergent conclusions of the United States Courts of Appeals.

ARGUMENT

I. The "Use of Force" Clause in the Armed Career Criminal Act (the "ACCA"), 18 U.S.C. § 924(e)(2)(B)(i) Does Not Include Crimes With a *Mens Rea* of Mere Recklessness.

This Court held in *Voisine* that the phrase "misdemeanor crime of domestic violence," defined at 18 U.S.C. § 921(a)(33)(A), includes crimes committed recklessly. 136 S. Ct. at 2282. But, the rational in *Voisine* does not extend to the use of force clause in the ACCA because those two statutes use different language and have distinct goals.

A misdemeanor crime of domestic violence is defined as a misdemeanor that, in pertinent part, "has, as an element, the use or attempted use of physical force . . . ." 18 U.S.C. § 921(33)(A)(ii). This Court in *Voisine* was interpreting the meaning of this phrase in the context of 18 U.S.C. § 922(g)(9), which makes it a crime for an individual "who has been convicted in any court of a misdemeanor crime of domestic violence" to possess a firearm or ammunition. Just like 18 U.S.C. § 922(g)(1), the statutory range that applies is zero to ten years. 18 U.S.C § 924(a)(2).

By contrast, the language at issue under the ACCA is a portion of the definition of a "violent felony," which, in pertinent part, is any felony that "has as an element the use, attempted use, or threatened use of physical force *against*

the person of another . . . ." 18 U.S.C. § 924(e)(2)(B)(i) (emphasis added). This statute prohibits not just the use of force, but the use of force against another person. And, this definition is used to determine not whether an individual's actions are sanctionable – but whether that individual should receive a substantial increase in his statutory range to a mandatory minimum sentence of fifteen years, up to a possibility of life in prison. Given the much harsher consequences of the statute, and the different language used by Congress, it makes sense that the violent felony definition in the ACCA would be limited to more serious conduct than the definition of "misdemeanor crime of domestic violence."

In *Voisine*, this Court focused on the term "use," and found that it means "the act of employing something." 136 S. Ct. at 2278. It concluded that a person does not "employ" force accidentally, but that use of force in this context requires volition. *Id*. at 2279. The Court turned to the example of a husband and a dinner plate, and explained the difference between the two examples. *Id*. In one, a husband drops the plate while doing dishes, and a shard cuts his wife's face, while in the other the husband throws a dinner plate at a wall next to his wife's head, and a shard cuts his wife's face. *Id*. The court explained that in the first example we cannot say that the husband actively

used force, but in the second example the act of throwing the plate constitutes a use of force. *Id*. The fact that the injury was not intended, but only the result of his reckless action did not matter. *Id*. This is because the action that is prohibited in the definition of "misdemeanor crime of domestic violence" is the "use of force". *Id*. The Court further noted that if it were to interpret this phrase as excluding reckless crimes, that the majority of the states' misdemeanor domestic assault statutes would be excluded – which could not be the intention of Congress. *Id*. at 2280; see also *id*. at 2282 ("the state-law backdrop to that provision [the ban on firearm possession by individuals with a misdemeanor crime of domestic violence], which included misdemeanor assault statutes covering reckless conduct in a significant majority of jurisdictions, indicates that Congress meant just what it said").

By contrast, the use of force clause in the ACCA does not apply to any use of force, as in the definition of "misdemeanor crime of domestic violence," but applies only to the use of force *against the person of another*. This additional language is limiting. "The italicized language is a restrictive phrase that describes the particular type of 'use of physical force' necessary to satisfy [the violent felony definition]." *Harper*, 875 F.3d at 331 (citing *generally* Shertzer, *The Elements of Grammar* 7 (1986)). Thus, the use of force

clause in the ACCA "requires not merely a volitional application of force, but a volitional application [that is specifically] 'against the person of another.'" *Harper*, 875 F.3d at 331.

Thus, the use of force clause of the ACCA "requires a *mens rea*—not only as to the employment of force, but also as to its *consequences* . . . ." Id. And, "that requirement is met if the actor intends (*i.e.*, 'consciously desires') to apply force to the person of another." *Id*. Acting with recklessness is not the same as consciously desiring to apply force to the person of another. Returning to the dinner plate example, the husband volitionally used force to throw the plate against the wall, but he did not volitionally use force against the body of his wife. See *id*. Recklessness means that he is indifferent as to whether his actions cause harm, "hence he does not consciously desire that application". *Id*. at 332. This indifference means that he has not *used* physical force *against the person of another*. See *id*. ("[a]s culpable as the reckless actor might be, therefore, he does not volitionally apply force "against the person of another"). Further, unlike the various state misdemeanor domestic violence statutes, excluding reckless crimes from the use of force clause in the ACCA will not wholly deprive the statute of practical effect. It

will merely ensure that a fifteen-year mandatory minimum is applied only to individuals who have prior convictions for serious, intentional, acts of violence.

Mr. Borden respectfully requests that the Court grant certiorari review in order to resolve this important question.

II. Due Process is Violated When a Court Applies an Interpretation of the ACCA to an Individual at Sentencing That Is More Punitive Than the Interpretation in Force at the Time of His Offense.

"[A]n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law, such as Art. I, s 10, of the Constitution forbids." *Bouie*, 378 U.S. at 353. "If a . . . legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a . . . court is barred by the Due Process Clause from achieving precisely the same result by judicial construction." *Id*. This prevents judicial constructions that turn an act that was innocent when performed into a crime after the fact, and it also applies to actions "that aggravate[] a crime, or make[] it greater than it was, when committed." *Id*. (citation omitted).

Thus, a violation of the Due Process Clause occurs when an individual is subjected to "an unforeseeable and retroactive judicial expansion of narrow and precise statutory language." *Id*. at 352. When explaining what constitutes an *unforeseeable* judicial construction, the Court looked by analogy

to the "similarly unforeseeable" example of a "court overrul[ing] a consistent line of procedural decisions with the retroactive effect of denying a litigant a hearing in a pending case, it thereby deprives him of due process of law." *Id.* at 355. At the time Mr. Borden committed his offense, the law in the Sixth Circuit held, as it had since 2010, that reckless aggravated assault did not qualify as a violent felony under the use of force clause in the ACCA. *McFalls*, 592 F.3d at 716. Not only did the Sixth Circuit overrule this consistent line of cases after Mr. Borden was indicted, but the new interpretation expanded the use of force clause to cover a broader range of conduct. As such, this new judicial interpretation cannot be applied to Mr. Borden, or others in his position, without violating the due process clause.

The fact that this Court had already issued its decision in *Voisine* does not make the change in law foreseeable. This Court in *Voisine* explicitly limited its decision to the "misdemeanor crime of domestic violence" context. 136 S. Ct. at 2280 n.4 ("[O]ur decision today concerning § 921(a)(33)(A)'s scope does not resolve whether [18 U.S.C.] § 16[5] includes reckless behavior.

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[5] This statute uses language similar to the ACCA, as it defines "crime of violence" as "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another . . . ." However, it is also more expansive than the force clause of the ACCA as

Courts have sometimes given those two statutory definitions divergent readings in light of differences in their contexts and purposes, *and we do not foreclose that possibility with respect to their required mental states*." (emphasis added) (citing *United States v. Castleman*, 572 U.S. 157, 164-65 n.4 (2014)). And, as is clear from the circuit split discussed in Subsection I above, federal judges remain divided as to whether *Voisine* applies to the ACCA at all.

In fact, just before Mr. Borden committed his offense, a district judge in the Eastern District of Tennessee, where Mr. Borden was prosecuted, held that he was "not convinced that the Sixth Circuit would interpret *Voisine* as invalidating *McMurray*," and therefore held that the career offender use of force clause (which the court noted is identical to the ACCA) does not encompass crimes committed with mere recklessness. *Wehunt*, 230 F. Supp. 3d at 846, 848. Other district court judges in the Eastern District of Tennessee would echo that sentiment. *See Davis v. United States*, 262 F. Supp. 3d 539, 550 (E.D. Tn. April 17, 2017) ("this Court is not convinced that the Sixth Circuit would interpret *Voisine* as invalidating *McMurray*"), and *Dillard v.*

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it includes misdemeanors and the use of force against "the *property* of another."

United States, Order, No. 1:02-cr-167, Doc. 114 (E.D. Tn. April 21, 2017) (same conclusion as *Davis*, by yet another district court judge).

Indeed, this Court held in *Peugh v. United States*, that even under an advisory guideline system, a sentencing judge would violate ex post facto principles if it applied a change in the guidelines that occurred after the defendant committed his offense when that change increased his guideline range. 569 U.S. 530 (2013). Those same concerns are implicated with even more force here, where not only was Mr. Borden's guideline range more than doubled (from 77 to 96 months up to 180 to 210 months), but the new judicial interpretation brought with it a mandatory minimum of fifteen years that replaced an otherwise applicable statutory maximum of ten.

This question is particularly important in the context of the ACCA, first because the statute has such a dramatic impact on an individual's statutory range, and second, because the scope of the statute fluctuates regularly. This case is a perfect example. At the time of Mr. Borden's federal offense, assault statutes that could be violated with mere recklessness were not violent felonies under the ACCA. *McFalls*, 592 F.3d at 716. Under *McFalls*, Mr. Borden only had two predicate convictions for ACCA consideration. This meant that his maximum possible sentence for violating 18 U.S.C. § 922(g) was ten years.

After Mr. Borden had committed his offense, and by extending the reasoning in *Voisine*, the Sixth Circuit abrogated *McFalls*, holding that reckless assault did, indeed, involve the "use" of force and thus was a violent felony. *Verwiebe*, 874 F.3d 258; *Harper*, 875 F.3d 329. The district court used this new interpretation of the law to find that Mr. Borden's reckless aggravated assault conviction is a predicate offense under the ACCA, raising his sentencing exposure to a mandatory minimum of 15 years in prison, up to life.

Mr. Borden was subject to a much greater penalty based on a post-offense change in the interpretation of the law. Applying a post-offense new interpretation of law to "change the punishment, and inflict a greater punishment" on Mr. Borden, offends "one of the principal interests that the *Ex Post Facto* Clause was designed to serve, fundamental justice." *Peugh*, 569 U.S. at 539, 550 (quotations omitted). Due process requires that Mr. Borden, and others similarly situated, be given the benefit of the *McFalls* interpretation, which was in effect at the time of his offense. He therefore is not subject to the ACCA sentencing enhancement.

Mr. Borden respectfully requests that the Court also grant certiorari review in order to resolve this important constitutional question.

CONCLUSION

The Courts of Appeals are divided regarding whether the use of force clause in the ACCA encompasses crimes committed recklessly. This means that some individuals will qualify for the ACCA's fifteen-year mandatory minimum depending not on their prior record – but on which district one is indicted in. Such arbitrary application of the ACCA should not be tolerated.

Because the ACCA has a dramatic impact on the mandatory maximum and minimums an individual faces, and because the scope of this statute is ever-fluctuating, this Court should clarify that the *Ex Post Facto* principles embodied in the Due Process Clause prevent applying a more punitive interpretation of the ACCA to a defendant at his sentencing then the interpretation prevailing at the time of his offense conduct.

In consideration of the foregoing, Petitioner urges the Court to grant certiorari review in order to resolve these important questions. Petitioner respectfully submits that the Petition for Certiorari should be granted, the judgment of the Sixth Circuit Court of Appeals vacated, and the case remanded for further consideration.

Respectfully submitted,

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